

# **EXHIBIT A**

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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF (NC)

**CISCO'S MOTION *IN LIMINE* NO. 1:  
MOTION TO EXCLUDE ARGUMENT  
AND EVIDENCE IN SUPPORT OF  
EQUITABLE DEFENSES**

**UNREDACTED VERSION OF  
DOCUMENT SOUGHT TO BE SEALED**

Judge: Hon. Beth Labson Freeman

1 **I. INTRODUCTION**

2 Cisco respectfully moves *in limine* for the preclusion of any evidence or argument before  
3 the jury related to Arista's equitable defenses that are to be decided by the Court. This includes  
4 unclean hands, waiver, equitable estoppel or misuse. Such information is irrelevant to any issue  
5 properly triable to the jury in this case, and would unfairly prejudice Cisco by exposing the jury to  
6 equitable arguments that have no place in the jury's deliberations.

7 Excluding equitable arguments and supporting evidence is consistent with this Court's past  
8 practice in its recent trials (*e.g.*, *Nortek*, *Gilead* and *Finisar*, discussed *infra*), where it repeatedly  
9 excluded from the jury's consideration issues that are relevant for the Court only. Arista should  
10 not be permitted, for example, to attempt to show the jury that Cisco allegedly engaged in  
11 "unreasonable delay" in bringing suit, or that a Cisco's employee's activities almost 30 years ago  
12 supports an "unclean hands" defense. Such evidence is not relevant to any issue the jury will  
13 decide. To the extent relevant at all, it will serve only to confuse the jury and to cause "undue  
14 prejudice" to Cisco by inviting a decision on an improper basis. This type of argument and  
15 evidence should be excluded and instead be proffered to the Court outside the presence of the jury,  
16 should the Court deem it necessary.

17 **II. FACTUAL BACKGROUND**

18 In its pretrial disclosures, Arista has revealed its intent to present voluminous evidence,  
19 argument and testimony to the jury on equitable issues that are for the Court alone to decide. In  
20 the section entitled "Witnesses Arista Expects To Call" on Arista's witness list, Arista lists as the  
21 subject of testimony one of "estoppel," "laches" or "misuse" for 11 of 15 trial witnesses. Jenkins  
22 Decl. Exh. 1 at 3. For example, for witness Michael Volpi, listed as "expects to call" by Arista,  
23 the "Substance of Trial Testimony" is comprised primarily of equitable issues: "Knowledge  
24 relevant to Arista's estoppel, laches, fair use and misuse defenses and damages." *Id.* Overall,  
25 Arista lists 36 different witnesses that it may call to testify regarding equitable defenses. Arista's  
26 exhibit list is similarly replete with evidence for the Court's consideration, instead of the jury. A  
27 text search of Arista's exhibit list indicates 1,134 different exhibits offered for the purpose of  
28

1 Arista's estoppel defense. A similar search for "misuse" shows 3,334 exhibits with that as its  
2 listed purpose.

3 During discovery, Arista contended, for various reasons, that Cisco's claims were barred  
4 under various equitable doctrines. *See e.g.*, Jenkins Decl. Exh. 4, Arista's responses to Cisco's  
5 Interrogatory No. 17 at 7, 12 ( . . . " Cisco's failure to inform Arista for at least six years (*i.e.*,  
6 from 2008 through 2014) that Arista's use of an 'industry standard' CLI violated Cisco's  
7 purported copyrights."; "Cisco's own commercial use of third-party CLI commands, hierarchies,  
8 modes, and prompts (including, for example, the Stanford EECF CLI, various third-party CLIs in  
9 Tail-f NSO CLI NEDs and CiscoWorks Network Compliance Manager NEDs, and the JUNOS  
10 CLI in the Tail-f NSO product and its predecessors) without seeking prior and/or any  
11 authorization from such third parties."; "Cisco's unreasonable delay in bringing its copyright  
12 claims against Arista has prejudiced Arista."; "Arista relied on Cisco's statements and conduct  
13 regarding the 'industry standard' CLI, to Arista's detriment. Arista would have made different  
14 decisions regarding its CLI if Cisco had asserted copyright ownership over the 'industry standard'  
15 CLI commands, hierarchies, modes, and prompts, and customers would not have invested in the  
16 CLI if they knew that Cisco asserted it was proprietary and could not be used by other vendors.";  
17 "Cisco's own unauthorized usage of third-party CLI commands, hierarchies, modes, and prompts  
18 bars its copyright claims against Arista."; "As Cisco co-founder Kirk Lougheed confirmed at his  
19 deposition, the source code for Cisco's first commercial router was written while Mr. Lougheed  
20 was an employee at Stanford and was based on source code written by William Yeager, another  
21 Stanford employee.")

22 The high level descriptions of "estoppel" and "misuse" on Arista's pretrial disclosures do  
23 not provide Cisco notice of all the testimony and theories Arista seeks to introduce at trial under  
24 the banner of its equitable defenses. Cisco therefore seeks to exclude any evidence and argument  
25 based on the contentions disclosed in Arista's response to Cisco's interrogatories asking for  
26 Arista's contentions on equitable issues: Cisco's Interrogatory Nos. 17 and 18, attached as Exhibit  
27 4 to the Jenkins Declaration. Cisco's Interrogatory No. 17, asked, in part, for Arista to "Identify  
28 and explain in detail all factual and legal bases for Your contentions that Cisco's claims are barred

1 by laches, acquiescence, estoppel, waiver, unclean hands, copyright misuse, and/or abandonment .  
 2 . .” And Cisco’s Interrogatory No. 18 asked for the bases for any contention that Cisco is barred  
 3 from obtaining equitable relief.

### 4 **III. LEGAL STANDARD**

5 “Evidence which is not relevant is not admissible.” Fed. R. Evid. 402. “Although relevant,  
 6 evidence may be excluded if its probative value is substantially outweighed by the danger of  
 7 unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue  
 8 delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403.  
 9 “‘Unfair prejudice’ within [this] context means an undue tendency to suggest decision on an  
 10 improper basis.” *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 993 (9th Cir. 2009)  
 11 (quoting Fed. R. Evid. 403 Advisory Committee’s note).

### 12 **IV. ARGUMENT**

13 As detailed above, Arista appears intent on spending a large amount of its trial time  
 14 arguing issues that are not relevant for the jury, such as Mr. Loughheed’s employment status when  
 15 authoring source code for Cisco’s original router in the 1980s; Cisco’s purported “unreasonable  
 16 delay” in bringing suit, and Cisco’s purported use of other vendor’s CLI commands in its network  
 17 orchestration products. These “sideshow” are not relevant to issues for the jury to decide. A  
 18 defendant’s “equitable defenses . . . are the province of the Court to decide.” *Gilead Sciences, Inc.*  
 19 *v. Merck & Co., Inc., et al*, No. 13-cv-04057-BLF, 2016 WL 3143943 at \*1 (N.D. Cal June 6,  
 20 2016). Evidence that relates only to Arista’s equitable defenses is therefore not relevant and  
 21 should be excluded from the jury trial under Fed. R. Evid. 402. Courts routinely have precluded  
 22 defendants from presenting equitable defenses to juries. *Presidio Components, Inc. v. American*  
 23 *Technical Ceramics Corp.*, No. 14-cv- 2061 at \*5–6 (S.D. Cal. Mar. 25, 2016) (Dkt. 275) (Ex. 3)  
 24 (order granting motion *in limine* to restrict equitable defense evidence to the bench trial); *JIPC*  
 25 *Mgmt., Inc. v. Incredible Pizza Co.*, No. CV 08-04310 MMM PLAX, 2009 WL 8591607, at \*19  
 26 (C.D. Cal. July 14, 2009) (“Presenting evidence on these issues [unclean hands] would pose a risk  
 27 of prejudice and confuse the jury”); *Pioneer Hi-Bred International, Inc. v. Ottawa Plant Food,*  
 28 *Inc.*, 219 F.R.D. 135, \*145–46 (N.D. Iowa 2003) (“[T]he court agrees with Pioneer that evidence

1 of or reference to the equitable defenses of laches, estoppel, or waiver must be barred in  
 2 proceedings in front of the jury.”); *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 2011 U.S. App.  
 3 LEXIS 3428 (9th Cir. 2011) (“Copyright misuse is an equitable defense to copyright  
 4 infringement”).

5 This “equitable” evidence should be excluded not only as irrelevant, but also under Rule  
 6 403 because, to the extent this evidence has any probative value, it is greatly outweighed by the  
 7 accompanying risk of jury confusion. Permitting Arista to submit evidence and argument to the  
 8 jury on equitable matters invites the jury improperly to determine liability “*on the basis of*  
 9 *‘equitable’ considerations that do not properly enter into any determination that the jury must*  
 10 *make.*” *Pioneer*, 219 F.R.D. 135, \*145–46 (emphasis added). As one example, Arista apparently  
 11 intends to present the jury with evidence related to Cisco’s “unreasonable delay” in bringing this  
 12 suit and Arista’s purported reliance on statements by Cisco ten years ago. These types of  
 13 arguments and evidence are relevant only to equitable defenses, and, if presented, would only  
 14 confuse the jury as to the liability for Cisco’s copyright claims. Similarly, Arista’s proffered  
 15 evidence regarding the creation of Cisco’s original router product by Mr. Loughheed purportedly is  
 16 relevant to Arista’s unclean hands affirmative defense, but, if admitted, that evidence would only  
 17 suggest the jury decide liability on an improper basis. Finally, Arista’s evidence regarding  
 18 “laches” (as disclosed for Mr. Volpi) would present the jury with even more confusing testimony  
 19 and argument, as the Supreme Court made clear that laches is not a defense to damages in  
 20 copyright actions. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 162, 167 (2014)  
 21 (“Laches, we hold, cannot be invoked to preclude adjudication of a claim for damages brought  
 22 within the three-year window.”).

23 Excluding equitable arguments and evidence is consistent with the Court’s recent practice.  
 24 In *Finisar Corp. v. Nistica, Inc.*, this Court heard evidence related to equitable defenses outside  
 25 the presence of the jury. Similarly, in *Gilead Sciences, Inc. v. Merck & Co., Inc.*, et al, No. 13-cv-  
 26 04057-BLF, 2016 WL 3143943 at \*1 (N.D. Cal. June 6, 2016), the Court held that the defense of  
 27 waiver should be addressed solely to the bench. Finally, in *Nortek Air Solutions, LLC v. Energy*  
 28 *Labs et al.*, the Court ruled that evidence and argument on Defendants’ equitable defenses of

1 laches and estoppel would not be submitted to the jury, but instead would be presented to the  
2 Court.<sup>1</sup>

3 In line with the Court's practice, any arguments and evidence in support of Arista's  
4 equitable defenses should be presented to the Court outside of the presence of the jury.

5 **V. CONCLUSION**

6 Cisco respectfully requests that that evidence and argument on Arista's equitable defenses  
7 be excluded from the jury.

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27 <sup>1</sup> See Nortek's Trial Brief and Offer of Proof, *Nortek Air Solutions, LLC v. Energy Labs et*  
28 *al.*, Case No. 5:14-CV-02919-BLF, Dkt. 275 at 4 (citing Pretrial Conf. Tr. (July 6, 2016) at 27:4-5.)

1 Dated: September 16, 2016

Respectfully submitted,

2 /s/ John M. Neukom

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